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No. 653

In the Supreme Court of the United States

OCTOBER TERM, 1961

LAVERE REDFIELD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court denying a motion for a new trial (Pet. App. 1–64) is reported at 197 F. Supp. 559. The per curiam opinion of the court of appeals (Pet. App. 65–66), adopting the opinion of the district court, is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1961 (Pet. App. 67), and a petition for rehearing was denied on November 13, 1961 (R. 243).[1]

[1] The Record before this Court is comprised of eleven volumes. Volumes I and II contain the original record of the district court and court of appeals proceedings. Volume III is

On November 30, 1961, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to January 12, 1962. The petition was filed January 9, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was compelled to be a witness against himself in violation of his constitutional privilege against self-incrimination.

2. Whether, under the circumstances presented herein, petitioner was denied assistance of counsel.

3. Whether petitioner was denied a fair and impartial trial by virtue of certain remarks of the trial judge.

STATEMENT

On May 26, 1960, an eight-count indictment was returned against petitioner in the United States District Court for the District of Nevada, charging him with the willfully attempted evasion of his own and his wife's income taxes for the year 1953 through 1956, computed on the community property basis, in violation of Section 145(b) of the Internal Revenue Code of 1939 and Section 7201 of the Internal Revenue Code of 1954 (Tr. 3). The reported and correct taxable income and tax liability, as alleged in the respective

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an index to the trial transcript. Volumes IV to XI contain the trial transcript. References to the original record will be designated "R." References to the trial transcript will be designated "Tr."

counts of the indictment, are as follows (R. 2-7; Tr. 2033-2038):

Count	Year	Reported		Correct	
		Income	Tax	Income	Tax
I	1953 (husband)	$36,107.97	$18,401.44	455,115.13	$30,652.44
II	1954 (husband)	186,748.63	91,502.11	306,133.80	160,181.38
III	1955 (husband)	74,076.79	34,492.22	155,992.54	84,102.73
IV	1956 (husband)	36,251.98	15,062.19	72,262.00	35,945.04
V	1953 (wife)	36,107.99	18,401.44	55,115.13	30,652.44
VI	1954 (wife)	186,748.63	91,502.11	306,133.80	160,181.38
VII	1955 (wife)	74,076.79	34,492.22	155,992.54	84,102.73
VIII	1956 (wife)	36,251.98	15,062.19	72,262.00	35,945.04

On October 28, 1960, after a jury trial, petitioner was convicted on all charges except Counts IV and VIII (R. 28; Tr. 2106-2110). On November 10, 1960, he was sentenced to imprisonment for five years and fined $60,000 (R. 33).

At the time of arraignment, petitioner, who is a wealthy man (Tr. 1972-1973, 1996, 2021; cf. Tr. 19, 23, 26), announced that, although he was financially able to employ counsel, he had decided to conduct his own defense (Tr. 3-10). Despite repeated efforts by the trial judge to make clear the dangers of such a course, petitioner persisted in this determination to act as his own attorney,[2] apparently motivated, at

[2] See the following passage in the opinion of the district court denying the motion for new trial (Pet. App. 12-13):

"• • • Between the time of arraignment on June 16, 1960 and the time the trial began, on October 4, 1960, this Court had occasion to meet with the defendant *in camera*. There were three to five such conferences, often as not dealing with de-

least in part, by reluctance to pay large attorneys' fees (Tr. 7, 11–40, 1982–1983; Pet. 23–25). During the trial petitioner frequently made statements of fact while cross-examining witnesses or addressing the court or jury, and was frequently admonished by the trial judge that he could not testify as to matters not yet in evidence while speaking in his capacity as counsel (see, *e.g.*, Tr. 784–799, 872–875, 911, 927–932, 1375–1391, 1557–1571, 1970–1992).

The government's evidence showed that petitioner had failed to report in his return large amounts of dividends, interest, and capital gain on the sale of securities (Tr. 1494–1554).[3] Many of petitioner's stocks were held in the names of nominees, and none of the dividends on these stocks were reported (Tr. 1510). The totals of the unreported income and evaded taxes established by the government's evidence for both petitioner and his wife are as follows (Tr. 1554–1557):

	Income	*Tax*
1953	$20,600	$10,400
1954	258,600	149,600
1955	294,400	175,800

fendant's desire to obtain a bill of particulars. On at least two of these occasions, there may have been more, the Court frankly discussed the matter of waiver with defendant, told him what he was getting into, and virtually pleaded with him to reconsider his determination to appear *pro se*. The defendant was adamant, but not in a belligerent manner. It was simply a case where an undeniably intelligent businessman had made an assessment of where he stood and what he wanted to do about it. He was stubborn about his decision, but gave absolutely no indication that he did not know exactly what he was doing."

[3] The detailed and exhaustive nature of the proof is indicated in the list of government exhibits in Vol. III of the record, pp. 8–46.

Petitioner did not take the stand in order to testify in his own behalf.

After the verdict, petitioner retained counsel who filed a motion for a new trial on November 3, 1960 (R. 33). The main contentions were that the trial court should not have allowed petitioner to waive his right to counsel, and that petitioner had been deprived of a fair trial by the court's efforts to prevent him from testifying from his place at counsel table. Retained counsel were allowed ample time to examine the trial transcript and document their arguments (Pet. App. 1–2). On March 23, 1961, the trial court filed an exhaustive opinion dealing with the numerous trial incidents upon which the motion was based (Pet App. 1–64). The court of appeals adopted this opinion as its own (Pet. App. 65–66).

ARGUMENT

1. (*a*) Petitioner asserts (Pet. 11–16) that his privilege against self-incrimination was violated because the court told him, when he persisted in making assertions of fact in the presence of the jury, that he could take the stand if he desired to testify. The contention is without merit, for, when the statements or directions of the court are examined in context, they will be seen to have been provoked by petitioner, and, indeed, to have been required if the trial was to be conducted with some degree of order and within the established rules of evidence. Repeatedly, while cross-examining a witness, petitioner would contradict and argue with the witness and make assertions of fact as to his own version of events. Thus, without taking the stand and

subjecting himself to cross-examination by the government, petitioner attempted to get his views across to the jury. The opinion of the district court, carefully treating each of these individual instances in context (Pet. App. 33–49), amply demonstrates both the provocation and the necessity for the court's action.

In similar circumstances, objections based on the privilege now asserted have been emphatically rejected. In *Smith* v. *United States*, 234 F. 2d 385 (C.A. 5th), where the accused appealed from his conviction after a trial during which he acted as his own attorney, the court of appeals affirmed. It observed (*id.* at 388–389):

> * * * [T]he court demonstrated great patience and unusual tolerance with the accused who undertook to combine argument, testimony in his own behalf, and interrogation of witnesses. The trial court would not conceivably have tolerated the self-serving statements made by the accused and his flat denials of statements made by witnesses, and his irrelevant comments, if made by a lawyer. In fact, the criticism now levelled at the trial court for referring to the right of the accused to testify in his own behalf arose entirely from the court's patient explanation, repeatedly made to Smith as he purported to cross examine government witnesses, that he could not argue with them or dispute them, as he repeatedly did, but that if he wanted to get his views to the jury he ought to take the witness stand. There is no merit in the contention that the court prejudiced appellant by any of such statements or by all of them taken together.

Accord, *Shelton* v. *United States*, 205 F. 2d 806, 810 (C.A. 5th); *Smith* v. *United States*, 216 F. 2d 724, 727 (C.A. 5th).

The cases cited by petitioner are not in conflict with the conclusion that, in the context of the present case, the statements of the court were proper. None of the cases cited involved a defendant who interjected his own unsworn statements into the trial, or a defendant or his counsel who did anything to put the judge in a position where a remonstrance was necessary.

(*b*) Petitioner further claims (Pet. 16–17), on the basis of a brief and transparently harmless passage in the record (Tr. 870–871), that he was compelled "to become a witness against himself." While cross-examining a witness, petitioner brought out certain facts favorable to himself, which showed that on a certain occasion petitioner had waived any right to interest in a business transaction out of sympathy and a desire to help the witness (Tr. 869–870). Merely by way of clarification, the court inquired of petitioner as to when the waiver had taken place and with respect to what specific property. Petitioner answered; the matter was clarified; and the only effect was to make clear the story which petitioner was trying to convey to the jury through the witness. There was clearly no prejudice to petitioner.

(*c*) Petitioner also argues (Pet. 17–18) that his privilege against self-incrimination was violated because of the admission of certain evidence as to the difficulty encountered by Internal Revenue Agents in their attempt to get any information from petitioner

during their audit of his tax returns. Petitioner also raises the same issue with respect to the prosecutor's comment on this evidence. But the contention is without merit, for the passages in the record (Pet. App. 68–84), upon which petitioner relies, show that, when the revenue agents called upon petitioner for information or records, he never claimed the privilege. On the contrary, these excerpts show that petitioner furnished the agents with fragmentary information; that he repeatedly promised to furnish more information; that his excuse for delay was merely that he was "very busy" (Pet. App. 78–79); and that, as to a net worth statement, "he didn't think that it was necessary" (Pet. App. 78).

Having failed to assert the privilege at the time, and having failed to assert it or to make any objection at the trial, petitioner cannot now raise the issue since the privilege is waived if a timely claim is not made. *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 112–113; *Rogers* v. *United States*, 340 U.S. 367, 370–371; *United States* v. *Monia*, 317 U.S. 424; *United States* v. *Murdock*, 284 U.S. 141, 148.

In the absence of a claim of privilege, the refusal, in violation of a taxpayer's statutory duty, to make available his records of income (see Sec. 54(a) of the 1939 Code; Sec. 6001 of the 1954 Code; Treasury Regulations 111, Sec. 29.54–1; Treasury Regulations on Income Tax (1954 Code), Sec. 1.6001–1) could be considered by the jury as "covering up sources of income" and being "conduct, the likely effect of which would be

to mislead or to conceal." *Spies* v. *United States*, 317 U.S. 492, 499. The jury was entitled to weigh this circumstance. The decision below is in accord with other decisions on the point. *Myres* v. *United States*, 174 F. 2d 329, 337 (C.A. 8th), certiorari denied, 338 U.S. 849; *Olson* v. *United States*, 191 F. 2d 985, 988–989 (C.A. 8th); *Beard* v. *United States*, 222 F. 2d 84, 92–95 (C.A. 4th), certiorari denied, 350 U.S. 846.

2. Petitioner urges (Pet. 19–30) that the trial court failed to make sufficient inquiry into his waiver of counsel. But petitioner's own summary of what occurred shows that his present contention is groundless (Pet. 21):

> There is no question, as was pointed out by the Trial Court in its opinion (Appendix A), that the Court explained the complicated nature of the proceedings to the defendant; ascertained that the defendant was able to employ counsel; and *offered to appoint counsel*, all of which was rejected by the defendant-petitioner. * * *

That there is a right to refuse counsel, as well as to have counsel, and that the court may not impose counsel, certainly in the case of an adult, intelligent member of the community, is well established. *Moore* v. *Michigan*, 355 U.S. 155, 161; *Adams* v. *United States, ex rel. McCann*, 317 U.S. 269, 279; *Carter* v. *Illinois*, 329 U.S. 173, 174; *Burstein* v. *United States*, 178 F. 2d 665 (C.A. 9th).

Petitioner, however, insists that the court should have inquired into his motive, which was a desire to

save money, and that the court should have told petitioner that the government would pay his attorney's fee, even though he himself could well have afforded to do so. This novel argument is unsupported by any authority and carries the idea of the right to counsel to an absurdity. Moreover, in its appraisal of petitioner's reasons for refusing to retain counsel, the trial court concluded that very likely the basis for the refusal was "a careful calculation * * * by an undeniably shrewd man," who probably realized that, appearing alone, he "could play upon the sympathy of the jury" (Pet. App. 20).[4] In any event, the court did everything it could to persuade petitioner to obtain counsel, and petitioner was perfectly aware of the risk he was taking in refusing to appear with counsel.

3. Petitioner calls attention (Pet. 30–32) to two instances where the court attempted to bring him into compliance with accepted standards of court-room manners and procedure, and argues that they constituted a denial of due process. In each instance, petitioner indicated amazement at the answers he received during his cross-examination of government witnesses. The trial court had previously given him several warnings against commenting on the credibility of witnesses. The rebukes, when read in context, were well deserved. (See Pet. App. 37–38, 45.)

[4] The petitioner's argument to the jury demonstrates his shrewdness, his intelligence, and his tactics in this case (Tr. 1970–2026).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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